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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1957.

No. 667

LITITZ MUTUAL INSURANCE COMPANY, IMPLEMENT DEALERS MUTUAL FIRE INSURANCE COMPANY, and LITITZ MUTUAL INSURANCE COMPANY and IMPLEMENT DEALERS MUTUAL FIRE INSURANCE COMPANY, Doing Business as the JEFFERSON MUTUALS,
Petitioners,

vs.

MARTHA BARNES,
Respondent.

PETITION FOR WRIT OF CERTIORARI

To the United States Court of Appeals for the Fifth Circuit.

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vs.

MARTHA BARNES,
Respondent.

PETITION FOR WRIT OF CERTIORARI

To the United States Court of Appeals for the Fifth Circuit.

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Petitioners, defendants in the District Court, appellants below, respectfully pray that a writ of certiorari issue to

the United States Court of Appeals for the Fifth Circuit to review the judgment and opinion of that Court entered on October 1st, 1957 (reported at 248 F. 2d 241), affirming the judgment of the United States District Court for the Southern District of Alabama, rendered on October 1st, 1956 (reported at 146 F. Supp. 492). The opinion of the District Court may be found in the copies of the record in the Court below filed herewith, on pages 58-62 thereof. The opinion of the Court of Appeals is appended to this petition.

JURISDICTION.

The Court's jurisdiction is invoked upon the basis of the provisions of Title 28, United States Code, Section 1254 (1), setting forth the Court's power to review judgments of the Court of Appeals by way of writ of certiorari. As shown above, the judgment of the Court of Appeals sought to be reviewed was entered on October 1st, 1957, as appears from its minute entry appearing on page 95 of the certified record filed herewith. The rehearing sought by petitioners was denied by the Court of Appeals on October 31st, 1957, as appears from its minute entry appearing on page 113 of the certified record.

Thus, this petition for certiorari is presented within the time prescribed for applying therefor by Title 28, United States Code, Section 2101 (c).

QUESTIONS PRESENTED FOR REVIEW.

The questions presented in this cause may be stated as follows:

1. Can one occupying the position of a simple loss payee or appointee of an insured in a policy of fire insurance recover from the insurer where the insured's limited

interest in the property destroyed had been terminated prior to the institution of the suit?

2. Can there be a recovery on a policy of fire insurance where no monetary loss has been caused the insured?

3. Can a Court of Appeals decide an issue which should be controlled by local law directly contrary to the decisions of the highest Court of the State involved?

4. Is it in accord with the accepted and usual course of judicial proceedings for a Court of Appeals to completely ignore applicable state law on a question controlled by state law?

5. Where applicable, controlling state law affords a discharge of a liability, is it in accord with due process of law for a Court of Appeals to ignore such status of the law, and to enter judgment for a substantial amount against the party who seeks to have it invoke such applicable state law in its favor?

STATEMENT OF THE CASE.

This cause is a suit upon a policy of fire insurance issued by petitioners. Respondent, a citizen of the State of Alabama, filed the suit in the Circuit Court of Marengo County, Alabama. Petitioners, citizens of the States of Pennsylvania and North Dakota, respectively, removed the cause to the United States District Court for the Southern District of Alabama on the basis of the diversity of citizenship involved.

Although petitioners asserted several defenses, the only one material here was that respondent, being a simple loss payee of their insured, would be entitled to recover only if the insured could recover, and that since insured's only insurable interest in the property at the time of the

loss was a secondary liability upon a mortgage indebtedness on said property, and since he had been discharged from that secondary liability by respondent herself prior to the institution of this cause, the insured sustained no loss by the fire and could not recover against petitioners, and, therefore, neither could his appointee, the respondent.

The cause was submitted to the District Court without the intervention of a jury upon a stipulation of facts and eleven exhibits of a documentary nature. The stipulation of facts appears in the certified record on pages 41 through 51 and also on 51 through 52. The orginals of the eleven exhibits introduced during this stipulation were certified by the District Court to the Court of Appeals and have by that Court been certified and transmitted to this Court for its consideration in determining this cause.

For the proper understanding of the questions posed by this case, it is perhaps best to consider the rather simple, uncontroverted facts as they unfolded chronologically. The policy sued on was issued on October 2, 1949, covering on the property involved in this litigation in the amount of $5,000.00. As originally issued, the policy insured George H. Jay and legal representatives for a term of five years to the extent of the actual cash value of the property insured at the time of loss, not exceeding, of course, the amount of the policy, "nor in any event for more than the interest of the insured." The policy was the Standard form of policy and contained the usual provision that it was made and accepted subject to all its provisions and stipulations and all provisions and stipulations added thereto. It also contained the following clause:

> "Mortgagee Clause—Loss, if any, on building items shall be payable to: (1) D. F. Jacobs, Demopolis, Alabama, as interest may appear, subject to provisions of the Mortgagee Clause appearing on the reverse side of this form."

The policy was introduced into evidence as Exhibit No. 1 and has been certified to this Court for its examination so that its terms and provisions may be before the Court in their entirety in the consideration of this cause.

There seems to be no doubt that at the time of the issuance of this policy George H. Jay was the owner of the property involved. However, it is to be noted that the parties stipulated that title is assumed in George H. Jay as of March 22, 1952, at a time preceding any conveyance of the property in question out of him.

On October 22, 1949, George H. Jay and wife, Marjorie Jay, executed a mortgage on the property involved to one H. A. Feibelman in the amount of $7,000.00. This mortgage was introduced into evidence as Exhibit No. 8 and is before this Honorable Court.

On November 8, 1949, the following endorsement was added to the policy in suit:

> "It is stipulated that any loss that may be ascertained and proven to be due the Insured under this policy shall be held payable to H. A. Feibelman, Demopolis, Alabama, as his interest may appear, subject, nevertheless, to all conditions of the policy.
>
> Attached to and forming part of Policy No. 41662 of the Jefferson Mutuals, issued at its Newbern, Alabama, Agency.
>
> Dated November 8, 1949.
>
> Turpin Vise,
> Agent."

Some time during the year 1951 H. A. Feibelman died, testate. His last will and testament was probated in the Probate Court of Marengo County, Alabama, on December 28, 1951. A certified copy of his said will and the certifi-

cate of probate thereto was introduced into evidence as Exhibit No. 3. It is to be noted that the mortgage indebtedness in question was bequeathed to certain named co-trustees for certain specified trust uses. The same parties designated as the trustees in said will were also designated as the executors thereof.

From an examination of the endorsements to Exhibit No. 1 it will be noted that by endorsement dated March 1st, 1952, the name of the insured was changed from George H. Jay to Elmer Russell Wood. By deed dated March 22nd, 1952, and introduced into evidence as Exhibit No. 2, the property involved was conveyed by George H. Jay and wife, Marjorie A. Jay, to Elmer Russell Wood for a recited consideration of $12,500.00 and the assumption of the $7,000.00 mortgage which Jay had executed to Feibelman on October 22nd, 1949.

On February 20, 1953, pursuant to a decree rendered by the Circuit Court of Marengo County, Alabama, In Equity, in the matter of the final settlement of the estate of H. A. Feibelman, the co-executors under Feibelman's will transferred the mortgage indebtedness executed by George H. Jay to Feibelman on October 3, 1949, and assumed by Elmer Russell Wood on March 22, 1952, to the co-trustees named in the will of said decedent. Said conveyance was introduced into evidence as Exhibit No. 4.

This brings us down to the date of the fire, September 22nd, 1953. At 6:30 P. M. on that date (or fifteen minutes earlier or later) title to the insured property was transferred by warranty deed of that date, executed by Elmer Russell Wood and wife, Lottie M. Wood, to W. E. Curb. The delivery of the deed in question took place in the office of Attorney Thomas Seay in Marion, Alabama. The deed in question was introduced into evidence as Exhibit No. 5, and recited a consideration of $600 plus the assumption by

the grantee of the mortgage for $7,000.00 theretofore executed by George H. Jay to H. A. Feibelman, and previously assumed by the grantor in the deed, Elmer Russell Wood.

Approximately three and one-half hours after the delivery of this deed, the subject property was damaged to the extent of $4,000.00 by fire of undetermined origin. It was stipulated that this fire had its inception at 10:10 o'clock P. M. (or fifteen minutes earlier or later).

It was stipulated that after the transfer of the property from Wood to Curb, and after the property had been damaged or destroyed by fire, both of said events occurring as aforesaid on September 22nd, 1953, a request was received by the agent of appellants to transfer the policy sued on from Elmer Russell Wood to W. E. Curb, but, of course, such a transfer was never made (and for that matter, it is doubtful that it could have been effective as a matter of law, if made).

On March 11, 1955, there occurred a multi-party transaction of tremendous import in this litigation. As shown by Exhibit No. 11, W. E. Curb conveyed the property in question to John C. Barnes, Jr. (a three-fourths undivided interest), and to his mother, Margaret Coles Barnes (an undivided one-fourth interest). The deed recites a consideration of $100 in cash, the execution of a purchase money mortgage to the grantor in the amount of $6,500.00, and an assumption of the balance due on the mortgage executed by George H. Jay to H. A. Feibelman, which mortgage subsequent to its execution had in turn been assumed by Elmer Russell Wood, and then by the grantor in the present deed, W. E. Curb.

Exhibit 10, executed on the same day, March 11, 1955, is the purchase money mortgage forming part of the consideration for the deed from Curb to the Barnes. It is

noted that it is in the amount of $6,500.00, as stated in the deed. It is also particularly noteworthy that the plaintiff in this case, Martha Barnes, joined in the execution of the mortgage as one of the principals bound thereby, and that said mortgage contains the usual warranties of title to the grantee on the part of all the grantors therein, including the plaintiff in this case.

Also, on the same date of March 11, 1955, we have the execution of Exhibit No. 9, by the plaintiff in this case. It is this very important document which appellants claim has unquestionably established their non-liability in this case. This document recites the assumption of the Jay-Feibelman mortgage by the plaintiff's husband and mother-in-law on its date of execution, and further declares that the plaintiff was in the process of purchasing the aforesaid Jay-Feibelman mortgage. It goes on to expressly subordinate said Jay-Feibelman mortgage to the purchase money mortgage executed to Curb and states "that I do hereby forever release and discharge said W. E. Curb from any and all liability under the aforesaid Jay-Feibelman mortgage." It will be noted that none of the other persons secondarily liable on the Jay-Feibelman mortgage, that is, Elmer Russell Wood, or George H. Jay, were parties to this instrument nor does it appear anywhere else in the facts that they were ever notified or consulted regarding the execution of this release, nor ever consented thereto, nor ever agreed that their liability on the mortgage would remain unchanged thereby.

On April 18, 1955, as appears from Exhibit No. 6, the aforesaid Jay-Feibelman mortgage was transferred to the plaintiff in this case by the co-trustees of H. A. Feibelman, for the recited consideration of $4,545.09. Afterwards, on May 10, 1955, as appears by Exhibit No. 7, the co-trustees of the Feibelman estate specifically transferred to the plaintiff all of their rights and claim under the insurance

policy in suit. Thereafter, on September 16, 1955, the respondent here, plaintiff in the trial court, instituted the present suit in the Circuit Court of Marengo County, Alabama, as appears from the Clerk's endorsement on the Summons issued by the Court appearing on page 5 of the certified record.

On October 1, 1956, the District Court rendered judgment in favor of the respondent here, as is set forth on page 63 of the record. As appears from the report of the District Court's decision at 146 F. Supp. 492, also appearing on pages 58 to 62 of the record, the District Court based its judgment on the theory that respondent was protected by the provisions of the New York standard mortgagee clause contained in the policy sued on.

Petitioners filed a motion for modification of the finding of the District Court, which is set out in the record on pages 64 through 68. It will be noted that Ground 11 of that motion specifically raises the point of the non-liability of petitioners on the policy because of the discharge of their insured from liability on the mortgage held by respondent. The District Court overruled this motion on December 12th, 1956, following which the cause was duly appealed to the Court of Appeals.

As will be noted from an examination of the opinion of the Court of Appeals appended hereto and reported at 248 F. 2d 41, that Court on October 1st, 1957, affirmed the holding of the District Court by majority decision. It will be noted that the Court of Appeals expressly repudiated the theory of the District Court, that respondent was one protected under the provisions of the New York standard mortgagee clause, but, nevertheless, affirmed, without apparent consideration by the majority of petitioners' primary defense, so wholeheartedly championed by the dissenter, Judge Jones.

Petition for rehearing and brief in support thereof were filed in the Court of Appeals by petitioners and are contained in the certified record on pages 96 through 112 thereof. It will be noted from this petition and brief that petitioners again pressed the point of their non-liability under applicable Alabama law upon the Court of Appeals, but without result, as the Court denied the rehearing petition on October 31st, 1957, with Judge Jones again dissenting.

ARGUMENT.

It appears to petitioners that in the instant case the Fifth Circuit Court of Appeals is manifesting an inclination to return to the days prior to the decision of **Erie Railroad Company v. Tompkins**, 58 Sup. Ct. 817, 304 U. S. 64 (1938), and to apply the unconstitutional, discredited "general law" theory of the **Swift v. Tyson** era.

It is shown by the stipulated facts in this cause, and found by the Court of Appeals, that at the time of the fire complained of, the interest of the insured in the policy was merely for his protection as one secondarily liable upon a mortgage indebtedness on the insured property. Prior to the institution of this suit, respondent had released him from any such liability on the mortgage; he, therefore, faced no possibility of any loss on account of the fire.

Alabama law is clear to the effect that in cases involving insurance policies, as well as other types of written obligations "A liability may be fixed by the occurrence of the conditions provided for its existence, but after it is thus fixed, it may cease or terminate as to the parties in whose favor it exists, by events thereafter occurring which have that legal effect." **Aetna Insurance Co. v. Baldwin County Building & Loan Association**, 163 So. 604. It is also clear that Alabama law is explicit to the effect that a contract of insurance is a contract of indemnity only. **American Insurance Co. v. Porter**, 144 So. 129.

The majority opinion of the Court of Appeals fails to follow these explicit Alabama holdings. It is to be noted, however, that the dissenter, Judge Jones, would hold in conformity with the Alabama law. It strikes petitioners as quite strange that a majority of the Court should not even consider the issue—nor even mention it in their

opinion—which the minority member of the Court holds should be determinative of the whole cause.

Of course, the District Court did not even come to a consideration of this issue, for it decided the case upon an entirely different theory. It held that the respondent was protected under the provisions of the New York standard mortgagee clause. Under the law, the effect of this clause would be to make a separate contract between the insurer and the mortgagee, so that a defense against the named insured would have no effect upon the claim of the mortgagee. 5 Appleman, Insurance Law and Practice, pp. 559-561. However, this holding by the District Court was erroneous, as was correctly held by the Court of Appeals. Respondent's interests were derived through a simple loss payee clause, which made her a mere appointee of the named insured to receive whatever he might have been entitled to under the policy, to the extent of her interest, making her subject to any defenses which the insurer might have had against the named insured. 5 Appleman, Insurance Law and Practice, pp. 554-556. But with this determination, the majority of the Court of Appeals stopped. They did not go on to consider the stipulated facts and decide whether there had been a release of liability prior to the institution of suit, as contended by petitioners and as held by the dissenting judge. They did not consider the Alabama decisions cited by petitioners in their brief and find, as did the dissenting judge, that under the Alabama cases, matured rights under an insurance policy could be terminated by circumstances having that legal effect. They ignored the problem and, citing cases from other jurisdictions only, which could have no more than academic interest, they seem to hold as a matter of "general law" that when property, the subject of a policy of insurance, is burned, an insurance company must pay someone, even if the person insured sustains no loss. Petitioners cannot believe that the majority of the Court of Appeals did not

even perceive the question present for their decision after they had reached the result that the District Court's theory was erroneous, for petitioners certainly pointed the matter out to the Court of Appeals in brief. In this regard, petitioners are appending hereto pages 40 through 54 of their brief before the Court of Appeals.

Petitioners earnestly believe that there are special and important reasons existing for the grant of the writ of certiorari prayed for. The effect of the decision would be to deprive petitioners of a fairly substantial amount of money in a case, which if left in the Courts of the State of Alabama, would probably have been decided in petitioners' favor. But beyond the mere question of money, it restores the old era of uncertainty, and of discrimination, and of inequality before the law, existing in diversity of citizenship cases prior to the decision of **Erie Railroad Co. v. Tompkins**, supra. This Court has many times determined that certiorari will be granted where questions of local law are thus determined by the Courts of Appeals in a way apparently in conflict with the applicable state law.

Ruhlin v. New York Life Insurance Co., 304 U. S. 202, 58 Sup. Ct. 860;

Erie Railroad Co. v. Tompkins, 304 U. S. 64, 58 Sup. Ct. 817;

Aetna Insurance Co. v. United Fruit Co., 304 U. S. 430, 58 Sup. Ct. 959;

Forsyth v. Hammond, 166 U. S. 506, 17 Sup. Ct. 665;

Bernhardt v. Polygraphic Company of America, Inc., 350 U. S. 198, 76 Sup. Ct. 273.

Then, too, your petitioners humbly believe that the accepted, proper and usual course of judicial proceedings would require that, at the very least, an appellate court give consideration in its opinion to an issue of such significance and import that a minority member of the Court finds it controlling. In this trying age of external peril

and growing indications of internal decadence, it seems especially important to petitioners that there be emphasized and brought home whenever possible, that this is indeed a nation where the law reigns supreme, and not the capricious rulings of man. Petitioners earnestly believe that this case affords such an opportunity.

Wherefore, petitioners pray that a writ of certiorari issue out of and under the seal of this Court, directed to the United States Court of Appeals for the Fifth Circuit, commanding the said Court to certify and send to this Court, on a day to be designated, a full transcript of the record and all proceedings of said Court of Appeals on the case numbered 16466, and entitled on its docket—Lititz Mutual Insurance Company et al. Appellants, v. Martha Barnes, Appellee—to the end that this case may be reviewed and determined by this Court; that the judgment of the said Court of Appeals for the Fifth Circuit be reversed and a judgment here rendered in favor of petitioners; that petitioners be granted such other and further relief as to this Honorable Court may seem meet and proper.

Respectfully submitted,

HUGH A. LOCKE,
Counsel of Record for Petitioners.

JOSEPH S. MEAD,
MARSHALL H. FITZPATRICK,
Of Counsel.

APPENDIX I.

OPINION OF COURT OF APPEALS.

In the
UNITED STATES COURT OF APPEALS
For the Fifth Circuit.

No. 16466.

Lititz Mutual Insurance Company, et al.,
Appellants,

versus

Martha Barnes,
Appellee.

Appeal from the United States District Court for the Southern District of Alabama.

(October 1, 1957.)

Before Rives, Jones and Brown, Circuit Judges.

Rives, Circuit Judge: This appeal is from a judgment against the insurer in a fire insurance policy for the amount of $4,000.00 plus 6% interest from September 22, 1953, the date of the fire. The policy was issued on October 3, 1949, for a term of five years to October 3, 1954. To

an amount not exceeding $5,000.00. it insured against loss by fire George H. Jay to the extent of the actual cash value at the time of loss, "nor in any event for more than the interest of the insured" in a one story frame building known as 22 North Washington Street, Demopolis, Alabama. The provisions of the policy relating to the interest of a mortgagee are copied in the margin.[1]

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[1] "*Mortgage interests and obligations.* If loss hereunder is made payable, in whole or in part, to a designated mortgagee not named herein as the insured, such interest in this policy may be cancelled by giving to such mortgagee a ten days' written notice of cancellation.

"If the insured fails to render proof of loss such mortgagee, upon notice, shall render proof of loss in the form herein specified within sixty (60) days thereafter and shall be subject to the provisions hereof relating to appraisal and time of payment and of bringing suit. If this Company shall claim that no liability existed as to the mortgagor or owner, it shall, to the extent of payment of loss to the mortgagee, be subrogated to all the mortgagee's rights of recovery, but without impairing mortgagee's right to sue; or it may pay off the mortgage debt and require an assignment thereof and of the mortgage. Other provisions relating to the interests and obligations of such mortgagee may be added hereto by agreement in writing."

A "Mercantile Form" attached to the policy contained on one side thereof the following:

"*Mortgagee Clause*—Loss, if any on building items, shall be payable to: (1) D. F. Jacobs, Demopolis, Alabama .....; (2) ....., as interest may appear, subject to provisions of the Mortgagee Clause appearing on the reverse side of this form."

On the reverse side of the form appeared the following:

"*Mortgagee Clause (This entire clause is void unless name of mortgagee or trustee is inserted on reverse side in space provided)* —Loss, if any on building items under this policy, shall be payable to the mortgagee (or trustee) as provided herein, as interest may appear, and this insurance, as to the interest of the mortgagee (or trustee) only therein, shall not be invalidated by any act or neglect of the mortgagor or owner of the within described property, nor by any foreclosure or other proceedings or notice of sale relating to the property, nor by any change in the title or ownership of the property, nor by the occupation of the premises for purposes more hazardous than are permitted by this policy: Provided, That in case the mortgagor or owner shall neglect to pay any premium due,

On October 22, 1949, the insured Jay executed a mortgage on the property to H. A. Feibelman in the amount of $7,000.00. The property was warranted "free of and from all encumbrances" and presumably the mortgage theretofore held by D. F. Jacobs was paid off for nothing further is heard of that mortgage. On November 8, 1949, the following endorsement was added to the policy:

"Loss Payable.

"It is stipulated that any loss that may be ascertained and proven to be due the Insured under this policy shall be held payable to H. A. Feibelman, Demopolis, Alabama, as his interest may appear, subject, nevertheless, to all conditions of the policy.

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under this policy, the mortgagee (or trustee) shall, on demand, pay the same.

"Provided also, That the mortgagee (or trustee) shall notify this Company of any change of ownership or occupancy or increase of hazard, which shall come to the knowledge of said mortgagee (or trustee) and, unless permitted by this policy, it shall be noted thereon, and the mortgagee (or trustee) shall, on demand, pay the premium for such increased hazard for the term of the use thereof; otherwise, this policy shall be null and void.

"This Company reserves the right to cancel this policy at any time as provided by its terms, but, in such case this policy shall continue in force for the benefit only of the mortgagee (or trustee) for ten days after notice to the mortgagee (or trustee) of such cancellation, and shall then cease, and this Company shall have the right, on like notice, to cancel this agreement.

"Whenever this Company shall pay the mortgagee (or trustee) any sum for loss under this policy and shall claim that, as to the mortgagor or owners, no liability therefor existed, this Company shall, to the extent of such payment, be thereupon legally subrogated to all the rights of the party to whom such payments shall be made, under all securities held as collateral to the mortgage debt, or may at its option pay to the mortgagee (or trustee) the whole principal due or to grow due on the mortgage with interests, and shall thereupon receive a full assignment and transfer of the mortgage and of all such other securities; but no subrogation shall impair the right of the mortgagee (or trustee) to recover the full amount of his, her or their claim.

"The above Mortgagee Clause DOES NOT apply to personal property."

Attached to and forming part of Policy No. 41662 of the Jefferson Mutuals issued at its

Name of Insurance Company

Newbern, Alabama Agency.
City or Town State

"Dated November 8, 1949.

Turpin Vise Agent.
Turpin Vise"

In March, 1952, the property was conveyed by the insured Jay to Elmer Russell Wood for a consideration which included the assumption of the Feibelman mortgage. By endorsement the name of the insured was changed from Jay to Wood. At 6:30 P. M. on September 22, 1953, the property was conveyed by Wood to W. E. Curb who assumed the Feibelman mortgage. The name of the insured had not been changed from Wood to Curb when, approximately three and one-half hours after the delivery of this deed, the property was damaged to the extent of $4,000.00 by fire of undetermined origin.

The company received due notice of the fire and demands for payment from various persons, including the appellee, but the company has made no payment under the policy to any person.

On March 11, 1955, two and one-half years after the fire, W. E. Curb conveyed the property to John C. Barnes, Jr., and his mother, Margaret Cole Barnes. The deed recites a consideration of $100.00 in cash, the assumption of the balance due on the Feibelman mortgage, and the execution of a purchase money mortgage to Curb for $6,500.00. The purchase money mortgage was duly executed by the grantees joined by the appellee, Martha Barnes, the wife of John C. Barnes, Jr. At the same time, Martha Barnes executed another instrument in which she recited that she was in the process of purchasing the Feibelman mortgage,

subordinated the Feibelman mortgage to the purchase money mortgage, and released and discharged Curb from any and all liability under the Feibelman mortgage. Thereafter for a recited consideration of $4,545.09, the Feibelman mortgage was formally transferred to Martha Barnes. The co-trustees of the estate of Feibelman, then deceased, transferred to her also all of their rights and claim under the insurance policy in suit.

The facts were stipulated and the case submitted to the district court without a jury. That court entered judgment for the plaintiff upon the theory that she was "entitled to the full protection of the New York Standard Mortgagee Clause." It further held that, "Insurers cannot have subrogation against property of persons who are not parties to the cause."

We do not agree with the theory of the district court. The appellee is a successor in interest to H. A. Feibelman[2] who was named in a simple loss payable clause of such importance that its pertinent part is here repeated:

> "It is stipulated that any loss that may be ascertained and proven to be due the Insured under this policy shall be held payable to H. A. Feibelman, Demopolis, Alabama, as his interest may appear, subject, nevertheless, to all conditions of the policy."

Clearly, appellee's interest is limited to "any loss that may be ascertained and proven to be due the insured under this policy." Any such loss is payable to the appellee as her interest may appear. Appellee relies upon the words "subject, nevertheless, to all conditions of the policy," arguing that one of the conditions of the policy was the

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[2] In so holding we have not overlooked appellants' contention that the transfer of the mortgage "and all collateral pertaining thereto" by Feibelman's executors to themselves as co-trustees did not include matured rights of action not specifically assigned. See Thornton v. Strauss, 79 Ala. 164. The answer is that the right of action had not matured. The transfer was on February 20, 1953, while the loss did not occur until the following September 22.

New York Standard mortgagee clause under which D. F. Jacobs had been protected at the time of the issuance of the policy. By its own terms, however, that clause was void unless Jacobs' name had been inserted, and we can find no warrant for holding that the designation of Feibelman under a simple loss payable clause had the effect of substituting him for Jacobs in the New York Standard clause. The appellee was in the position of one who was an appointee of the insured to receive the proceeds of the policy to which the insured might be entitled, to the extent of the appointee's interest.[3]

A few hours before the fire, the insured Wood had parted with the ownership of the property. He remained liable, however, though as between himself and Curb, secondarily liable, for the payment of the Feibelman mortgage. Appellants concede, as they must, that Wood still had an insurable interest for protection against such liability. **Union Insurance Society of Canton v. Sudduth,** 212 Ala. 649, 103 So. 845, 847 (1925).

The limitation in the insuring clause of the policy, "nor in any event for more than the interest of the insured," makes it necessary to determine the extent of the insurable interest remaining in Wood after he had conveyed title to the property. We are of the opinion that that interest extended to the full amount of the mortgage debt for which Wood remained liable. As between himself and the insurance company, Wood did not have to speculate on whether the mortgage debt would be paid by Curb, nor on whether it could be collected by foreclosure on the prop-

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[3] 5 Appleman, Insurance Law and Practice, § 3401, pp. 554-556, 559-561; Home Loan & Finance Co. v. Fireman's Fund Ins. Co., 129 So. 470 (Ala. 1930); Hartford Fire Ins. Co. v. Aaron, 147 So. 628 (Ala. 1933); Heyl v. Aetna Ins. Co., 38 So. 118, 144 Ala. 549 (1905); Longfellow v. National Fire Ins. Co., 170 Pac. 813 (Kansas); Green v. Fidelity-Phenix Fire Ins. Co., 64 S. E. 2d 162, 233 N. C. 321 (1951); Atlas Reduction Co. v. New Zealand Ins. Co., 138 Fed. 497 (8th Cir. 1905); Brecht v. Law, Union & Crown Ins. Co., 160 Fed. 399 (9th Cir. 1908).

erty remaining after the fire. Under the policy, he had a right to look to the insurance as a primary source of protection against his liability. **Strong v. Manufacturers' Ins. Co.**, 10 Pickering 40, 20 American Decisions 507; **Buck v. Phoenix Ins. Co.**, 76 Me. 586 (1885); **Jenks v. Liverpool, London & Globe Ins. Co.**, 92 N. E. 998 (1910); 6 Appleman, Insurance Law and Practice, § 3868, p. 230; Couchs' Cyclopedia of Insurance Law, § 407, pp. 1180-1181; Jones, Mortgages, 4th ed., § 397, p. 301; 44 C. J. S., Insurance, § 187, pp. 883-884.

We do not mean to hold that Wood could have collected the insurance without applying it to the mortgage debt. That was not attempted. What we do hold is that, under the policy, Wood was clearly entitled to protection against his liability for the mortgage debt.

Upon the occurrence of the fire, the contract immediately ripened into one simply for the payment of money. **Union Insurance Society of Canton v. Sudduth**, supra. Feibelman's interest was in the same amount as that of Wood, and under the loss payable clause, the entire loss to the extent of the mortgage debt became payable to Feibelman **Capital City Insurance Co. v. Jones**, 128 Ala. 361, 30 So. 674 (1900).

Appellant insists, however, that, upon payment of the mortgage debt, it would have had a right to be subrogated to the mortgagee's rights of recovery, and that the appellee prejudiced those rights of subrogation when she released Curb from liability and subordinated the Feibelman mortgage to the purchase money mortgage executed by her husband and his mother to Curb. The contractual rights of subrogation contained in the policy were applicable only to a loss payable to a "designated mortgagee" under the mortgagee clause attached to the policy. The subsequent "loss payable" endorsement contained no mention of subrogation. The insurer has then no contractual right of subrogation.

It urges that, upon general equitable principles, if it pays Wood's debt, it should stand in Wood's shoes and have the right to pursue Wood's remedies against Curb and against the property. If Wood had breached the contract, some rights of subrogation might have accrued to his insurer, but we have been cited to no case, and we believe that none can be found, holding that an insurer which takes advantage of the defense that the fire occurred within a few hours after the insured had conveyed the property, and before, in the ordinary course of business, the name of the insured had been changed, has any right of equitable subrogation against the property or against its new owner. In our opinion, it cannot reasonably be claimed that such a result would be just and equitable. We hold, therefore, that, under the facts and circumstances of this case, the insurer never had any equitable right of subrogation.

Finally, the appellant urges that the district court erred in awarding interest from the date of fire. The policy contained the usual provisions as to when loss was payable, namely "sixty days after proof of loss," etc. There was no express stipulation concerning the proofs of loss or as to any specific denial of liability. Failure to furnish proofs of loss was not urged as a defense. As of the date of the trial, more than three years after the fire, it was stipulated that:

> "The company received due notice of the fire.
>
> "The policy has not been paid to any person, though demands have been made on us to pay W. E. Curb, Elmer Russell Wood, the co-trustees under the will of Harry A. Feibelman, and the plaintiff in this case, Mrs. Martha Barnes. To this point, we have made no payment to any person."

Under Rule 52 (a), Federal Rules of Civil Procedure, we think that it was not clearly erroneous for the district court to infer that the company had denied liability from

the beginning, and had waived the requirements of the policy authorizing it to delay payment awaiting proofs of loss. **St. Paul Fire & M. Ins. Co. v. Garza County W. & M. Ass'n,** 93 F. 2d 590, 592 (5th Cir. 1937); 46 C. J. S., Insurance, § 1393, p. 698.

The judgment is therefore affirmed.

Jones, Circuit Judge, Dissenting:

The insurance policy was for a five year term commencing October 3, 1949. The insured was Jay. The coverage was $4,000. The policy contained an endorsement providing that any loss due the insured would be payable to Feibelman who held a mortgage on the property. On March 22, 1952, Jay conveyed to Wood who assumed payment of the mortgage debt. By endorsement Wood became the insured under the policy. By deed dated September 22, 1953, Wood conveyed the premises to Curb who assumed and agreed to pay the mortgage debt. Wood remained the insured named in the policy. Curb did not become an insured. On the same day, September 22, 1953, a fire occurred resulting in a loss exceeding the amount of the policy. On March 11, 1955, Curb gave a deed of the premises to John C. Barnes, Jr., and Margaret Cole Barnes, his mother. They assumed the indebtedness of the Feibelman mortgage. John C. Barnes, Jr., his wife Martha Barnes, the plaintiff-appellee, and Margaret Cole Barnes gave Curb a purchase money mortgage for $6,500. This mortgage recited that all three of the mortgagors were indebted to and had given their promissory notes to Curb. On the same day, March 11, 1955, Martha gave to Curb an instrument in which it was recited that she was in the process of purchasing the Feibelman mortgage and by which it was provided that she subordinated the Feibelman mortgage to the mortgage given by the Barnes to Curb and releasing Curb from liability on the Feibelman mortgage. Feibelman died. His executors, by an instru-

ment dated February 24, 1953, reciting the direction of a decree of the Circuit Court of Marengo County, Alabama, transferred the mortgage of Jay to Feibelman, with other mortgages, to Feibelman's testamentary trustees. On April 18, 1955, the trustees of Feibelman executed a transfer of the Feibelman mortgage to Martha Barnes. It was stated that a principal balance of $4,420 was unpaid. On May 10, 1955, the trustees of Feibelman released quit-claimed, transferred, assigned and conveyed to Martha Barnes all of their right, title, interest and claim in and to the insurance policy. If they had what they purported to assign the record does not show it.

After Wood parted with title to the insured premises he had, the majority hold, an insurable interest by reason of his liability on the mortgage debt. But as between Wood, the insured, and Curb, his grantee, the liability of the latter was primary, and that of Curb was secondary and contingent. When Martha Barnes subordinated the Feibelman mortgage to the mortgage which she, with her husband and his mother, gave to Curb, and released Curb from the obligation which he had undertaken when he purchased from Wood, Wood was also released and upon becoming released his insurable interest was gone. Martha Barnes as assignee of the Feibelman interest in the policy could have no greater rights than Wood and the Wood interest was extinguished along with the liability upon which the interest was dependent.

The majority would not hold that Wood could have collected the insurance without applying it to the mortgage debt. But they would and do hold that the proceeds become payable after the mortgage debt has, as to Wood, become extinguished.

Insurance is an agreement to indemnify against loss. Feibelman sustained no loss, Wood sustained no loss and yet Martha Barnes recovers. Regretfully and deferentially I dissent.

APPENDIX II.

EXTRACT FROM PETITIONERS' BRIEF BEFORE COURT OF APPEALS.

Specification of Error No. 2.

Inasmuch as the appellee in this case had no interest in the policy sued on other than a mere appointment to receive to the extent of her interest, the proceeds of the policy to which the insured was entitled, as is demonstrated in the argument on the last preceding Specification of Error, it would thus seem logical to appelants that a determination of whether the insured named in the policy was entitled to any recovery thereunder at the time this suit was instituted would be the pertinent inquiry. It was appellants' contention in the court below that there was no such liability to the insured under the policy at the time of the institution of this suit.

It is undisputed in the facts that prior to the occurrence of the fire, the insured had completely divested himself of any title or ownership to the insured property. Just prior to the fire his only interest in the preservation of the property was his right to be exonerated out of it to the extent of his secondary liability on the Jay-Feibelman mortgage. However, six months prior to the time that this suit was instituted, even this last vestige of the insured's interest in the insured property was completely and efficaciously obliterated.

The instant suit was filed on September 10, 1955, but on March 11, 1955, appellee had released the insured named in the policy from his secondary liability on the Jay-Feibelman mortgage by the execution of the subordination agreement and release which is Exhibit No. 9 before this Honorable Court. With the execution and delivery of this instrument, Elmer Russell Wood's insurable interest in this

property went out the window; after that date any liability under this policy to him was as effectually terminated as if the policy had never existed. Let us examine the controlling principles of law as they bear upon the undisputed facts.

A contract of fire insurance is a contract of indemnity only. An insured may recover only to the extent of his monetary loss—nothing more. This fundamental doctrine finds expression in **Appleman on Insurance, Vol. 4, § 2107**, page 10:

> "A contract of fire insurance is a personal contract for indemnity for the insurable interest possessed by the insured at the time of the issuance of the policy, and also at the time of loss. The insured's liability is measured thereby. All such contracts of property insurance, whether for fire, marine, or other types are considered contracts of indemnity, intended solely to indemnify the insured for his actual monetary loss by the occurrence of the disaster. Unless the insured has sustained an actual loss, the insurer has no liability."

It is basic in insurance law that an insured must have an insurable interest in the property covered for the policy to be valid and collectible. **Girard Fire & Marine Ins. Co. v. Gunn**, 130 So. 180, 221 Ala. 654; **American Equitable Assurance Co. v. Powderly Coal & Lumber Co.**, 142 So. 37, 225 Ala. 208. What was the insurable interest of the insured in the instant policy at the time this suit was instituted? Absolutely none! With what monetary loss was he faced at the time of institution of this suit? Again, absolutely none!

Wood had parted with ownership of the property prior to the fire. When he sold this property and its loss by fire fell upon another and not upon him, the only possible interest he could have had in the property was based upon his liability as a surety on the indebtedness secured by

the Jay-Feibelman mortgage. Therefore, the policy insured him only in that capacity at the time of the fire. It did not and could not insure him as owner of the property because he was not the owner of it, and the loss by fire did not fall upon him but upon his grantee. In the case of Union Insurance Society of Canton v. Suddeth, 212 Ala. 649, 103 So. 845, there was a somewhat similar insurable interest. In that case, the plaintiff, a mortgagee and conditional vendor of automobile trucks, endorsed the purchase money notes and hypothecated them to a bank. The contention was made that the mortgagee had parted with all insurable interest in the property. The Alabama Supreme Court, Mr. Justice Bouldin writing, said:

> "However, a mortgagee who endorsed the notes evidencing the secured debt, still has an insurable interest by way of protection against his liability as endorser and may hold the policy for such purpose."

So, it must be admitted that at the time of the fire Elmer Russell Wood did have this limited insurable interest, and, in the words of Justice Bouldin, he could at that time hold the policy "by way of protection against his liability as endorser."

But what about subsequent developments? What about the situation existing at the time this suit was filed? What about the effect of the execution by this appellee of the instrument before this Honorable Court as Exhibit No. 9 to the facts stipulated between the parties?

There is no dissension among the authorities as to the effect of such an action as taken by this appellee when she released W. E. Curb from any liability on the Jay-Feibelman mortgage. **American Jurisprudence, Volume 50, § 109,** page 976, states:

> "A surety is entitled to be subrogated to the benefit of all the securities and means of payment under the

creditor's control, and so, in the absence of assent, waiver, or estoppel, he is generally released by any act of the creditor which deprives him of such right. The creditor must for a surety's benefit apply to his debt all moneys and securities of the principal within his control which he has the right to apply, and if he voluntarily surrenders or releases the same, the surety is discharged pro tanto."

The proposition is thus stated in **50 Corpus Juris, Principal & Surety, § 259**, page 158:

"A creditor or obligee, who has securities or funds in his possession applicable to the payment of the secured debt, is under the obligation to the surety to use ordinary care and prudence to preserve such securities or funds for the surety's benefit, and the surety is discharged from further liability either entirely or pro tanto if the creditor, in dereliction of his duty, relinquishes or loses them by his wilful acts or through his negligence, or if he consents to a material alteration of the security to the prejudice of the surety, or by any act deprives the surety of the right of subrogation. Relinquishment operates as a discharge of the surety without regard to the existence of collusion or time when the creditor received the security held by him, or whether the surety has knowledge thereof, or whether the principal lacked capacity to enter into the contract."

It has been held that a mortgagee may not even extend the time for payment to an assumptor of the mortgage, without the mortgagor's consent, without releasing the mortgagor from liability for the debt. In **First National Bank of Birmingham v. Hendrix**, 241 Ala. 675, 4 So. 2d 407, in an opinion written by Chief Justice Livingston of the Alabama Supreme Court in 1941, this statement is found:

"When the mortgagee accepts the relationship thus created, he cannot extend the time of payment without the mortgagor's consent without releasing the mortgagor from liability for the debt."

At the time of the transaction on March 11, 1955, whereby W. E. Curb conveyed the insured property to the Barnes, the purchase money mortgage was executed by the Barnes, joined by the appellee, to Curb, and the appellee executed the instrument releasing Curb from any liability on the Jay-Feibelman mortgage, the order of liability on said mortgage was, first, W. E. Curb; second, Elmer Russell Wood; and third, the original mortgagor, George H. Jay. Insofar as Wood was concerned, W. E. Curb was the primary debtor at that time. There is no principle better settled than that a discharge of the principal debtor from liability necessarily discharges the sureties or endorsers. This proposition is not controverted and cannot be. **Scott v. McGriff**, 132 So. 177.

To cite all the authorities to the effect that the discharge by the creditor of one primarily liable on an indebtedness also amounts to a discharge in law of those secondarily liable, would unduly prolong this brief. Suffice it to say, that the principle is well established in the law of every jurisdiction, so far as can be determined by appellants. It has also been written into the statutory law of many states. For instance, in the State of Alabama there are a number of statutes giving rights to sureties which are entirely inconsistent with continued liability on the surety, following a discharge by the creditor of one primarily liable for the debt. **Alabama Code of 1940, Title 9, §§ 78, 79, 80, 84, 87 and 89.** These statutes are set out in full in the appendix to this brief. Section 89 gives one secondarily liable the right to require the creditor to sue the principal debtor, and upon failure of the creditor to do so, specifically provides for his discharge. Where a creditor has disabled herself from suing W. E. Curb by her release of him from

the mortgage indebtedness, it would be a complete non sequitur to attempt to maintain that this statutory provision would not result in a release to the surety, Elmer Russell Wood.

But, says appellee in this case, her rights to recover on this policy were fixed as of the time of the fire loss, and since at that time the insured named in the policy, Elmer Russell Wood, had an insurable interest in the insured property, slight though it may have been, appellee can recover in this suit, despite the fact that prior to the institution thereof she may have released Elmer Russell Wood from liability on the Jay-Feibelman mortgage and thus have destroyed any interest he may have had under the policy. Isn't it a foregone conclusion that the occurrence of the casualty insured against by a policy of insurance fixes and determines the rights of parties thereunder?

Anticipating this position of appellee, appellants answer that as in any other branch of law, rights under policies of insurance may be defeated and completely dissolved by developments subsequent to their creation. There could be no better illustration of this than the case of **Aetna Ins. Co. v. Baldwin County Building & Loan Assn.**, 163 So. 604. In the words of the opinion in that case:

> "A liability may be fixed by the occurrence of the conditions provided for its existence, but after it is thus fixed it may cease or terminate as to the parties in whose favor it exists, by events thereafter occurring which have that legal effect."

The contentions and relationships of the parties in the **Aetna Case** are in so many respects analogous to those of the parties in the instant case, and appellants so earnestly believe that the principle announced in it should be controlling in this case, that they desire to quote at some length from the opinion rendered therein:

"Plaintiff had a mortgage on the property burned, a dwelling house, and the lot on which it was located. The mortgagor paid the premium on the policy issued to her, and had attached to it the New York standard mortgage clause, by which, among other provisions, the loss was payable to plaintiff as mortgagee, as interest may appear, not to be invalidated by any act or neglect of the mortgagor, nor by foreclosure sale of the property nor any change in title or ownership. The house then burned and thereafter plaintiff, the mortgagee, duly foreclosed its mortgage and became the purchaser of the property for the full amount due on the mortgage debt.

"The question here is whether plaintiff was shown to have a right to recover the amount of the loss thus insured, continuing up to the time of the beginning of the suit, or whether his right terminated by the foreclosure sale in which the plaintiff was the purchaser at the full amount of the debt.

* * * * * * *

"The provision in the mortgage clause by which the policy shall not be invalidated as to him by the foreclosure does not refer to a forfeiture of his right after the loss occurred, but to the status existing at the time of the loss. The stipulation is that the insurance shall not be invalidated by such foreclosure; not that thereby the mortgagee may not lose his right to collect the loss by a foreclosure thereafter occurring, and occasioned by his status thus created, upon a consideration of established principles. His interest in the claim for the loss must exist not only at the time of the loss, and that is not diminished by a foreclosure which may have occurred theretofore, but it must also exist at the time of the suit and judgment. A liability may be fixed by the occurrence of the conditions provided for its existence, but after it is fixed it may

cease or terminate as to the parties in whose favor it exists, by events thereafter occurring which have that legal effect.

"As we view the status of the parties, it is this: When and immediately after the fire occurred plaintiff was a creditor of Mary Martin in the sum of approximately $1,300. Plaintiff had security for that debt consisting of a mortgage on property and a claim for the loss on the insurance policy. But in no event, and from those or other sources, was he due to collect more than his mortgage debt. He could elect what course to pursue to collect his debt, or pursue them all at the same time. Enforce some or all of his collateral and sue the debtor on his personal liability. If the debtor paid him by a voluntary act, all his rights and remedies immediately terminated, and he could not proceed further to enforce any feature of his security. While he had a claim fixed by the fire loss, it was only as security, and it could and would have terminated by such voluntary payment. No one will contend that a creditor may sue on a collateral note after the debt is paid for which he holds it as collateral, though it became due and liability on it was certain and fixed before the principal debt was paid. A debt is as effectually paid whether by the voluntary act of the debtor, or by compulsory proceedings of any sort which have that legal effect. When so, all rights as a creditor immediately terminate. The further rights of the parties will then depend upon the status created by the incidents which terminate the relation of debtor and creditor. A new relation then begins, controlled by its own terms. Unless by such arrangement the former creditor reserves the ownership or the right to collect the collateral which he held when a creditor, that right terminates with the relation to which it was but an incident.

"It is a fixed principle that when a mortgagee forecloses his mortgage, and at the sale the property

brings, and he collects the full amount of his debt, he is no longer a creditor, but his debt is paid. This is so when he buys at the sale, with due authority, bidding the full amount of his debt. He is then the owner of the property, and not a creditor. There is in the former owner only a statutory right, which is not a property ownership. He has collected his debt as effectually as if another had bought the property and paid him the full amount as purchase money, or if the debtor had paid him in cash of his own accord."

The case of **Aetna Ins. Co. v. Koonce**, 233 Ala. 265, 171 So. 269, is another case demonstrating that after a loss under a policy of insurance the amount recoverable by a mortgagee may be changed by circumstances.

"The amount payable to mortgagor and mortgagee, respectively, changes with every monthly payment on the mortgage debt. All this is in contemplation when the policy is issued, is part of the contractual obligation arising from the transaction."

New Hampshire Fire Ins. Co. v. Curtis, 85 So. 2d 441, is another case holding that the rights of parties under a policy of insurance are subject to change and alteration after a loss has occur ed under the policy.

"The evidence shows that the accident occurred on November 22, 1953, and that the acceptance corporation repossessed the wreckage or salvage on February 3, 1954, which was before the insurance company made any adjustment of the loss or paid the acceptance corporation anything in respect to it. This adjustment was made on April 27, 1954. The salvage was sold by the acceptance corporation for $1,800. So that if, on April 27, 1954, the plaintiff was not indebted to the acceptance corporation in any sum, the entire amount of liability for the loss was payable to plaintiff. It is not important that the repossession occurred subsequent

to the wreck. The rights of plaintiff and of the acceptance corporation, respectively, were but an apportionment of the insurer's liability and that apportionment could be altered by a change of circumstances at any time before a settlement was made with the acceptance corporation. Aetna Ins. Co. v. Koonce, supra."

There is nothing strange or unusual about this concept that rights under policies of insurance may be abridged, or even completely lost after a loss has occurred. In every branch of law there could be cited examples of rights being materially altered or even lost after they have come into being. Where an indebtedness under any form of contract has been discharged after it matures, there existed during the interval following its maturation and before the discharge of the indebtedness, a period during which the creditor was due a liability from the debtor which he could have enforced in an action at law; but following the discharge of the indebtedness, whether it be by release, by accord and satisfaction, by payment from a stranger to the obligation, or from whatever other cause, the creditor's right against the debtor has been altered—it has been dissolved. That is exactly the situation which we have in this case.

Just as was the case with the mortgagee in the **Aetna Ins. Co. v. Baldwin County Building & Loan Association**, supra, this appellee is attempting to adopt inconsistent attitudes. In the **Aetna Case** the mortgagee had an election as to the securities on which he would rely for payment of the mortgage debt. He could have sued under the insurance policy which was fully matured and recovered his interest in that manner. In this case the mortgage would have been extinguished and the remainder of the real property would have reverted to the mortgagor. Or, as he did, the mortgagee was entitled to rely upon the security of the property to foreclose his mortgage lien, and satisfy his mortgage indebtedness through the foreclosure sale. When

the mortgage indebtedness was discharged in this manner the mortgagee surrendered his rights under the insurance policy, as the Court held. But the mortgagee desired to "have his cake and eat it, too." He desired to enjoy the security of the property and also enforce payment from the insurance company of the proceeds of the policy. As the Court so justly held, he could not have both. He could have only one satisfaction.

The appellee in this case is adopting just such an inconsistent attitude. For the moment let us suppose that the appellee acquired the Jay-Feibelman mortgage without executing the release and subordination agreement given by her to Curb. She would have had a number of securities for her mortgage indebtedness. First, of course, there would have been the primary security of the mortgaged property; from aught that appears this may have been a first mortgage, if the mortgage lien previously enjoyed by D. F. Jacobs had been extinguished (the evidence in the case is silent upon this point). Then there would have been the primary obligation of the Barnes, who assumed the indebtedness on the mortgage. Then there would have been the secondary obligation of W. E. Curb on the mortgage; following which would have been, next in order, the obligation of the insured in the policy, Elmer Russell Wood, and then the personal obligation of the original mortgagor, George H. Jay. In addition, there would have been the security afforded the appellee under this policy of insurance; she would have been entitled to whatever rights Elmer Russell Wood had thereunder. Of course, after the sale by Wood to Curb the barest sort of insurable interest remained in Wood, that is indemnity against his being called upon as surety to pay the mortgage indebtedness. With all the prior security available for the debt, the likelihood that he would be called on would appear remote. However, the amount that Wood could have possibly recovered under the policy on account of his interest is not

of immediate concern. Alabama law is clear to the effect that where only a limited interest is covered by a policy of insurance, recovery cannot exceed the value of the interest insured. **American Ins. Co. v. Porter**, 144 So. 129.

But, whatever her reasons, appellee made her choice as to which of these securities she desired to rely on and to retain. She released W. E. Curb from any liability on the mortgage indebtedness; it follows as a matter of law, as we have seen above, that she thereby also released Elmer Russell Wood and George H. Jay. Since we have already demonstrated in the argument on the first Specification of Error, that appellee's rights in the policy in suit were derived solely from whatever rights Wood might have therein, she has also released these appellants, since her release of Wood extinguished the mortgage indebtedness as to him and destroyed any right of recovery he might have had under this policy. After the release, there was no prospect of his sustaining monetary loss on account of the fire.

Appellee by her actions in executing the release and subordination agreement to W. E. Curb, has irrevocably chosen to rely solely upon the security afforded by the mortgaged property, and on the security afforded by the personal obligation of the only persons liable on the mortgage, the Barnes, the owners of the title to the property in question. This case is but another example, with the case of **Aetna Ins. Co. v. Baldwin County Building & Loan Association**, supra, of a party's attempting to "have her cake and eat it too." The appellee has made her choice, for whatever reasons were good and sufficient to her (and we can well imagine and speculate what those reasons were), and she must be held to be bound thereby. She cannot release Elmer Russell Wood from liability on this mortgage indebtedness at one time, and then later on demand payment from him on such indebtedness. By the same token, she cannot discharge these appellants' obliga-

tion to Elmer Russell Wood under the policy, she cannot abrogate her derivative rights to stand in Elmer Russell Wood's shoes under said policy, as she has done by her extinguishment of the mortgage indebtedness insofar as Wood was concerned and by her eradication of the last vestige of interest which Wood had in the instant policy, and later on attempt to capture the proceeds of this policy as a mere windfall or enforced contribution to her and to those who alone are liable for the mortgage indebtedness at the time suit was instituted, as she is attempting to do in this case.

Just as a matter of interest, even though appellants do not consider it necessary to the decision of this case in their favor, exactly what was the effect of the multi-lateral transactions occurring in March and April of 1955 with respect to the insured property and the mortgage indebtedness thereon? All the parties concerned with the subject matter were completely changed. The owners of the insured property were changed from Curb to the Barnes.

The owner of the Jay-Feibelman mortgage was changed from the Trustees of H. A. Feibelman to the appellee in this case. Those liable on the Jay Feibelman mortgage as debtors were changed completely, all of the previous obligors thereon were discharged by the appellee's execution of the release to W. E. Curb; the only debtors remaining liable thereon were completely new parties to the mortgage, the Barnes. Even some of the incidents of the mortgage indebtedness were changed. It was no longer a prior mortgage on the property but, instead, was subordinated and postponed to the new mortgage indebtedness created in favor of W. E. Curb. Only a mere shell of the old transaction remained, the bare papers evidencing any obligation, the mortgage deed and the note. But should a stranger examine those bare evidences, could he in a million years tell what the actual status was? No, he could not. All of the names appearing on the papers, and

many of the provisions set forth in the papers had "gone with the wind." There had been a novation, the creation of a complete and absolutely new obligation with completely new and different parties thereto. **American National Bank & Trust Co. v. Powell**, 178 So. 21, 235 Ala. 236; **Taylor v. Federal Land Bank of New Orleans**, 191 So. 211, 238 Ala. 366; **Butler v. Walton**, 56 So. 2d 369, cert. denied 56 So. 2d 379.

This new mortgage indebtedness coming into existence as of March 11, 1955, with completely new mortgagor and mortgagee, with different terms and provisions, was not the mortgage indebtedness in existence when the loss payable clause to H. A. Feibelman was added to the policy of insurance sued on. The parties did not have in mind any contract with reference to this completely different obligation at that time. It is a well settled rule of law, that it is only those circumstances which are known to the parties at the time of contracting which they may fairly be said to have had in mind when the contract was made. It is just as true in insurance law as it is in any other branch of contract law, that in interpreting the matters covered by a contract, it is only those things which the parties had in mind at the time of the contract which fall within its provisions. **Home Insurance Co. v. Addler**, 71 Ala. 516; **London Assurance Corporation v. Poole**, 101 So. 831, 212 Ala. 109.

Appellants feel that the basic error committed by the District Court in completely pretermitting their defense that no liability existed to this appellee, inasmuch as the insured in the policy was not entitled to recover thereunder at the time this suit was brought, should dispose of this entire appeal. There is no conflict in the evidence, as the facts were all stipulated. Since the law on the point is clear, appellants earnestly submit to the Court that the judgment should be reversed and one rendered herein in their favor.